93-745

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

MITCHELL SHANDS, DON KEY and FORREST BUSCH,

Petitioners,

vs.

CITY OF KENNETT, and WARREN KARSTEN, JOHN MALLOTT, JERRY TALLEY, JOHN VARDELL, and JINGO COLE, Individually and in their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October, 1993

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits the discharge of volunteer firefighters for privately speaking with a city official involving substantial matters of public concern absent a showing of actual harm to an important government interest.

2. Whether a right to liberty was implicated when city official made statements to the news media during coverage of the terminations of four fire department employees that they had been discharged for "misconduct" and that "discrepancies" had been found requiring an "audit" of the department.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MITCHELL SHANDS, ET AL., PETITIONERS

v.

CITY OF KENNETT, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Mitchell Shands, Don Key, and Forrest Busch respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., p. A2) is reported at 993 F.2d 1337. The decision of the district court (App., p. A18) is reported at 789 F. Supp. 989.

JURISDICTION

The judgment and opinion of the court of appeals was entered on May 21, 1993. A timely motion for rehearing was denied on July 9, 1993. On September 20, 1993, Justice Blackmun extended the time for filing a petition for writ of certiorari to and including October 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, *inter alia,* as follows:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, Section 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

This case arises out of the discharge of four volunteer firefighters from employment with the City of Kennett for privately speaking with a city councilman concerning city policy and matters of fire safety.

Following their discharge on April 10, 1989, Petitioners brought suit alleging their discharge impermissibly infringed on their rights of freedom of speech and petition. The also asserted that they were deprived of a liberty interest in their good names and reputations by the statements of city officials to the news media in connection with the discharges which created false and stigmatizing impressions that they were guilty of criminal acts.

At trial, the district court instructed the jury that to return a verdict for plaintiffs it must find that the private conversation with the city councilman did not unduly interfere with their ability to perform their jobs or cause any actual or potential disruption to the fire department's functions. It further

instructed the jury on the Fourteenth Amendment due process claim that it would have to find that city officials had made public statements which "suggested, implied or created the false impression that plaintiffs had taken money, manipulated figures on fire reports, slashed tires, made threatening telephone calls, or received payment from the city for services when none had been performed." The jury returned verdicts for petitioners on both counts.

The district court granted a judgment n.o.v. setting aside the jury's verdict and dismissing the case. It concluded that although the jury could have determined petitioners were discharged for statements relating to safety within the department, it was unable to find any evidence that the private statements to the councilman *did not* cause any actual or *potential* disruption to the fire department. The court of appeals found the district court had improperly submitted the question of whether the speech caused actual or potential disruption. It concluded that such a determination was a matter of law rather than one of fact and proceeded to address it for the first time on appeal.

The Eighth Circuit found no evidence the private conversation with the councilman had caused any actual harm or disruption to the efficiency of the fire department. It held that evidence of actual disruption is not required in all cases. It concluded that the potential for harm was sufficient when an employer "reasonably believes" speech has or will undermine his authority, create dissension or cause disruption of the department. It found two of the three topics addressed in petitioners' speech were matters of public concern relating to the "quality and safety of the fire department." It concluded that the third topic, although "undoubtedly related" to the safety concern, touched upon a matter of public concern in a tangential manner. As to the level of public interest, the panel found the speech was of limited public importance because the public concerns had been discussed only within the fire department rather than being the center of an ongoing public debate. It further noted that there was no evidence that the speech hindered petitioners' job responsibilities.

With respect to the liberty interest claim, the court of appeals concluded as a matter of law that the evidence failed to show either that the statements were made "in connection with" the discharge or seriously stigmatized petitioners.

2. STATEMENT OF FACTS.

A. THE CONCERN WITH FIRE SAFETY.

The City of Kennett owns a municipal utility company managed and operated under state law by a separate Board of Public Works also referred to as Light, Gas & Water (LG&W). In early 1989, LG&W issued a new policy which prohibited anyone except one of its employees from disconnecting utility service, including electric meters. A copy of the policy was posted on the bulletin board in the fire department. The policy created serious problems for the public and firemen attempting to perform their firefighting duties. If the current or gas to a building needed to be turned off or disconnected, it was necessary to contact LG&W and request one of its employees be sent to the fire scene. Normally, the LG&W employee would arrive at the fire 15-20 minutes later. (Tr., p.245 lines 9-12; 567-68, lines 4-25/1-14). The length of the delay in large part depended on whether the fire was during the day or night, with the delays at night being longer. Firemen were therefore required to postpone their firefighting efforts until the LG&W employee had arrived and disconnected the utilities or risk serious injury and loss of life from a live electric current or a gas explosion. (Tr., p. 567-68; 243-244, App., p. A4). These dangers were explained to Chief Mallott and the fire department as a part of a fire training program in early March of 1989.

A vacancy for a firefighter had remained unfilled since the beginning of 1989 and an employee of LG&W had submitted an application to serve as a volunteer firefighter. Having a LG&W employee as a volunteer firefighter was an obvious solution to safety problem created the LG&W policy. Such an individual would be authorized to disconnect utilities without the necessity

of calling LG&W thereby avoiding unnecessary delays in fighting fires.

In mid-March Chief Mallott mentioned in passing to Don Key, and a day or two later to fire captain Bob Holder, that he was considering an individual to fill the vacancy. No notice of the vacancy had been posted or otherwise advertized outside the department. Individuals seeking to serve as volunteer firemen frequently kept their applications on file for years before a vacancy occurred. Key mentioned to the chief that he knew an employee of LG&W had submitted an application for a firefighter position and expressed the belief that all applications on file should be considered. The chief told Key and Holder he would schedule a meeting with them to review the applications before he made any decisions. However, he admitted at trial that he had already made up his mind but made no effort to communicate that decision to them. He left the false impression he would consider other applicants and further discuss the filling the position with them.

The city council had established a fire department committee composed three city council members whose duties it was to oversee the operations of the department. The committee also recommended individuals to the council to fill any vacancies. In the latter part of March 1989, the committee recommended David Horton to the council for the volunteer firefighter position. The city's employment policy required that a recommendation of employment must be presented to the council two weeks prior to any vote on hiring the individual.

On Saturday morning, April 1, 1989, petitioners privately met with Councilman Jingo Cole at his place of business before he opened. They explained their concerns about the department, including the safety problem created by LG&W's policy and the importance of having someone who could disconnect electric meters at a fire. They mentioned to him that an employee of LG&W had applied and asked him to support a motion at the next city council meeting scheduled for April 4th to postpone for two weeks action to fill the position. They further explained that their reason for requesting a delay was to provide time to explore the possibility of creating a second

position so that both the LG&W employee and David Horton could be hired. (Tr., p. 574-575, lines 22-25/1-5).

Petitioners denied any motivation or action on their part to undermine the chief's authority. They and fire captain Bob Holder all had impeccable employment records and had never been subject to disciplinary action by any superior including Chief Mallott. They all performed their duties well and at no time failed or refused to follow any direction or carry out any order they were given. They maintained a good working relationship with the chief and none of them had a conflict or personal employment dispute with him. Petitioner Shands, an electrical contractor himself, testified that the main reason he went with Key, Busch and Holder was the safety issue of hiring someone authorized under LG&W's policy to disconnect electric meters at fires.

At the city council meeting on April 4, 1989, Councilman Cole seconded a motion to delay for two weeks action to fill the volunteer firefighter position. The motion failed and Horton was employed by the council. Following the meeting, Chief Mallott learned that Cole had been contacted by members of the fire department and questioned him to learn the identities of the individuals who had spoken to him. The chief decided that night he would dismiss the individuals involved once he learned their names for insubordination in going behind his back. Over the next several days Mallott continued his efforts to learn the names of the individuals. Cole subsequently confirmed the names of the four firemen. Mallott met with Mayor Karsten and the fire department committee and obtained their approval to discharge petitioners. On evening of April 10, 1989 after a fire department training meeting, Mallott handed petitioners and Holder letters of dismissal. The letters stated the reasons for discharge to be insubordination and misconduct.

B. CITY OFFICIALS' STATEMENTS TO THE PRESS.

The matter gained wide notoriety the next several days in the newspaper and on two area television news reports. The chief, mayor and chairman of the fire department committee

gave interviews the next morning to newspaper and television reporters covering the terminations. They confirmed the stated reasons for discharge. The chief was infuriated by the attention provided by the news media, and in the first of three newspaper interviews he gave, he mentioned to the reporter the likelihood that an audit would be conducted of the department. The reporter separately interviewed Mayor Karsten and fire committee chairman Talley the same morning. She asked the mayor whether any audit was expected, to which he replied: "Probably. We'll have an audit done soon--we found some discrepancies. I can't comment on that." At trial the mayor admitted that there had been absolutely no basis for the statement that discrepancies existed or for conducting an audit of the fire department. Immediately after her interview of the mayor, the reporter contacted Talley. In response to her question about an audit, he stated: "There will probably be an audit called for in the Fire Department, we definitely found some discrepancies. Nothing else will be said until the audit is completed." She also identified Talley as the "source" of the statements she used in her article on the termination that the tires on the chief's automobiles had been slashed, harassing telephone calls made to his home and threats made against the chief. He also told her Councilman Cole had been "lied to" and that "some firemen" had manipulated or intentionally misstated figures on fire reports. In the newspaper article petitioners were named along with reference to criminal acts mentioned in Talley's statements.

Mallott attributed the media attention to petitioners and told another firefighter, "*If they want publicity, I'm going to show them publicity!*" Within a week after the terminations, Mallott gave two television interviews concerning the terminations and three news paper interviews, the last two being lengthy ones taking parts of two days to complete. In the interviews he made various statements about Key and Holder. He stated firemen had claimed and collected money for fire training meetings without doing any training. In a subsequent article based on conversations with a fire department member and the city clerk, the reporter stated: "No one knows where all the money went

for out-of-town fires." Petitioners asked the mayor twice to provide them with a statement of the reasons for their discharge, and on each occasion he refused. On April 18, 1989 they attended a regular city council meeting. During the public comment section of the agenda Bob Holder objected to the insinuations about audits and missing money. He denied any wrongdoing and requested the council to publicly clear their good names of any suggestion of dishonesty or criminal acts. No city official took any action but let things stand as they appeared in the press.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's decision extending the "reasonable belief" standard of proof of *Connick v. Myers* to employee speech involving substantial matters of public concern conflicts with the decisions of a majority of the other Circuit Courts of Appeal.

A majority of the circuits have adopted a standard of scrutiny in employee speech cases requiring evidence of actual harm or disruption to a governmental interest to override an employee's expressions on substantial matters of public interest. These circuits include the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits. The decision of the Eighth Circuit adopting a "reasonable belief" standard directly conflicts with decisions in those circuits. Significantly, the Eighth Circuit has acknowledged the absence of any evidence of actual harm or disruption to the fire department as the result of the private conversation between petitioners and the city councilman. Neither could it find any evidence that a close working relationship between petitioner and the chief was essential to the fulfillment of the department's mission. It further found there was no evidence that the speech hindered petitioners' ability to carry out their responsibilities. With respect to the need for harmony among co-workers, the panel was unable to find any evidence the speech created dissension or animosity

among co-workers. Petitioners all had impeccable employment records and their conversation with Councilman Cole in no way pertained to any personal grievance involving their employment.

The court held that actual or objective evidence of harm or disruption was not required, and that the chief's "reasonable belief" that the petitioners' speech was an attempt to undermine his authority or would lead to disruption in the department was sufficient to justify their dismissal.

The panel conceded that two of the three topics which were the subject of their conversation plainly addressed matters of public concern dealing with the "quality and safety of the fire department." It likewise found the third topic involving the request for a two week postponement before filling the firefighter vacancy was "undoubtedly related" to the safety concern of hiring someone authorized to disconnect electric meters at a fire. It is important to remember that firefighters are in the business of protecting property from destruction and saving lives. The effectiveness of their equipment and their general safety and welfare are of crucial importance to the society which they serve. Here the risk of serious injury or death due to the lack of a firefighter qualified to disconnect electric current or the gas supply required a delay of 15-20 minutes in firefighting operations. Within that time property may be consumed by fire or lives lost. Petitioners' speech addressed real and important issues of public concern. Likewise the needs of the fire department and the qualifications of the individual selected to meet those needs are matters of concern to each and every individual of the community.

In *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S. Ct. 1684 (1983), this Court held the government's burden in justifying the discharge of a public employee for exercise the right of free speech varies depending on the nature of the employee's expression. The Court stated:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. Furthermore, we do not see the

> necessity to allow events to unfold to the extent that disruption of the office and the destruction of working relationships is manifest before taking action. (p. 152).

The Court found that out of the fourteen item questionnaire Myers circulated among co-workers only one question addressed a matter of public concern. The survey was also designed to support of her ongoing personal dispute over her transfer. Under these narrow circumstances, the Court held Connick was justified in dismissing her for actions he "reasonably believed" would disrupt the office, undermine his authority and destroy close working relationships.

The Court carefully limited its ruling to the facts of the case in stating:

> We **caution** that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern. [Emphasis Supplied] (p. 152).

The majority of the circuits have interpreted this admonition to require a higher level of scrutiny for employee speech involving more substantial matters of public concern. The different formulations are sometimes described as a "showing of actual or concrete harm," "demonstration of actual, material and substantial harm," "demonstration of serious impairment," or "showing of objective evidence of disruption."

In *American Postal Workers Union v. U.S. Postal Service*, 830 F.2d 294 (D.C. Cir. 1987), Chief Judge Wald and Judge Ruth Bader Ginsburg held that the speech of a postal employee outweighed the government's claim of confidentiality for the mail absent evidence of actual or concrete harm. In his dissenting opinion Judge Bork stated:

> Unless this decision is overruled . . . today's rulings are thus capable of doing severe damage in this circuit to . . . the government's ability to discipline employee misconduct. (p.315).

The First Circuit in *Cota v. Brasslet,* 762 F.2d 827 (1st Cir. 1985) held that evidence of the detrimental impact of an employee's speech must be objectively sufficient and that "operational efficiency objections must be real and important before they can serve as basis for discipline or discharge."(p. 845).

In *Zamboni v. Stamler,* 847 F.2d 73 (3rd Cir. 1988), *cert. denied* 488 U.S. 899, 102 L.Ed. 2d 233, 109 S.Ct. 245 (1988), the Third Circuit refused to find the potential for disruption was sufficient to outweigh a public employee's First Amendment interest in speaking out on substantial matters of public concern. The court held such cases required a showing of actual, material and substantial harm or disruption. (p.78-79). *Accord: Roth v. Veteran's Administration,* 856 F. 2d 1401, 1407 (9th Cir. 1988).

In *Melton v. City of Oklahoma City,* 879 F. 2d 706 (10th Cir. 1989) *overruled on other grounds,* 928 F.2d 920, *en banc,* (10th Cir. 1991), the Tenth Circuit rejected the potential impact of employee speech requiring instead that the city produce evidence of actual disruption of the police department's services. (p. 715-716).

The Second Circuit in *Donahue v. Winsor Locks Board of Fire Commissioners,* 834 F. 2d 54 (2nd Cir. 1987) required the public employer to demonstrate that a firefighter's speech seriously impaired the efficiency of the firehouse before it will serve as grounds for dismissal. (p. 58).

The Fifth Circuit in *Matherne v. Wilson, 851 F. 2d 752 (5th Cir. 1988)* found the sheriff offered no evidence the speech related activity of one of his investigtors had impaired working relationships with his superiors or created any debilitating strife within the office. In ruling in favor of the employee, the court noted:

> Occasionally, the state's burden to justify its action may be as light as merely proving that the employer "reasonably believed the employee's speech was likely to disrupt its operations." [citation omitted]. However, where as here, "the employee's speech more substantially involves

> matters of public concern, the burden increases to require objective evidence of disruption. [citation omitted].

The position of the Seventh Circuit is not entirely clear. In *Conner v. Reinhard,* 847 F.2d 384 (7th Cir. 1988), *cert. denied,* 488 U.S. 856, 102 L.Ed. 2d 118, 109 S.Ct. 147 (1988), the court held that where the defendants failed to provide any evidence of actual harmful effects caused by the employee's alleged insubordination, the potential for office disciplinary problems insufficient. However, in *Marquez v. Turnock,* 967 F. 2d. 117 (7th Cir. 1992), the court has more recently in dicta questioned whether evidence of actual disruption would be necessary. It observed that the standard announced in *Conner, supra.,* was inconsistent with the decision of the court in *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251 (7th Cir. 1985) indicating the court would look at the ordinary and foreseeable effect of the conduct to determine whether it would be reasonably calculated to create division or affect discipline. (p.1178).

Along with the Eighth Circuit, the Eleventh Circuit has rejected the requirement of actual harm or disruption. In *Waters v. Chaffin,* 684 F.2d 833 (11th 1982), it expressly rejected the D.C. Circuit's actual harm standard in favor of a "reasonable likelihood" that the speech will lead to disruption. (p.839, n. 12).

The Eighth Circuit's extension of the low level "reasonable belief" standard of *Connick v. Myers* to cases involving more substantial matters of public concern represents a significant encroachment on the freedom of public employees to engage in the exchange of ideas on issues relating to social, economic, and governmental affairs. The decision in this case sharpens and makes the conflict among the circuits complete. It is certain to generate confusion in the circuits and in the district courts across the country. The lower courts therefore need guidance from this Court to bring about consistency of interpretation of its decisions. As things now stand, a particular expression of views by a public employee may constitute protected First Amendment speech in one circuit in the absence of proof of any

adverse or harmful effect while in an adjoining circuit the same speech may be proscribed and form a basis for retaliatory discharge.

II.
The Eighth Circuit's disposition of the liberty interest claim is inconsistent with the decisions of this Court.

The jury was instructed to return a verdict for petitioners only if it found that city officials made public statements "in connection with" their discharges and that such statements created or conveyed a false impression that petitioners had stolen money, tampered with fire reports, slashed tires, made threatening phone calls or fraudulently collected money from the city for services when none had been performed. All of these activities constitute criminal offenses under Missouri law. The jury subsequently returned its verdict for petitioners.

The evidence was ample to support the jury verdict and the Eighth Circuit does not take issue with the factual determination as to the nature of the statements. Instead, it has concluded as a matter of law that the statements were neither stigmatizing or made "in connection with" the discharges. Little insight is provided for those conclusions and they stand in apparent conflict with the decisions of this Court. The evidence showed that city officials made public statements to the news media regarding "misconduct" on the part of petitioners, the existence of "discrepancies" in the department requiring an audit, manipulating fire reports, and threats against the chief. These statements were made during interviews with the press covering the reasons for petitioners' terminations and on the very next morning after they were fired.

In *Codd v. Velger*, 429 U.S. 628, 51 L.Ed. 2d, 97 S.Ct. 882 (1977), this Court recognized that a liberty interest may be implicated whenever an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination." (429 U.S.628). In *Owens v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct.

1398 (1980), this Court ruled that although the stigmatizing charges there were not the cause for dismissal, they were certainly made "in the course of termination of employment." The court of appeals had likewise held that the statements impinged upon the police chief's liberty interest in his reputation and good name when city officials made public charges against him "contemporaneous and, in the eyes of the public, connected with the discharge." (p. 632-633).

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted to review the decision of the Eighth Circuit Court of Appeal and resolve the confusion among the circuits upon this important constitutional questions involving employee speech. Furthermore, this Court's attention is necessary to maintain supervision over and uniformity among the lower court in the proper interpretations of its decisions.

Respectfully submitted,

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